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No. 87-1207

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1987

RAY WILL,

Petitioner,

v.

MICHIGAN DEPARTMENT OF STATE POLICE,
and
DIRECTOR OF MICHIGAN STATE POLICE,

Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of Michigan.

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the 42d Congress intend that states be included with the meaning of "person" in §1 of the 1871 Civil Rights Act (42 USC §1983)?

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STATUTES WHICH THE CASE INVOLVES

Section 1 of the Civil Rights Act of 1871 ("Ku Klux Klan Act") ("Third Force Act"); 17 Stat 13, ch 22, §1 (1871).

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication", and the other remedial laws of the United States which are in their nature applicable in such cases.

Section 2 of the "Dictionary Act"; 16 Stat 431, ch 71, §2 (1871)

> SEC. 2. And be it further enacted, That in all acts hereafter passed words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular; words importing the masculine gender may be applied to females; the words "insane person" and "lunatic" shall include every idiot, non-compos, lunatic, and insane person; and the word "person" may extend and be applied to bodies politic and corporate, and the reference to any offi-

cer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense; and the word "oath" shall include "affirmation" in cases where by law an affirmation may be substituted for an oath, and in like cases the word "sworn" shall include the word "affirmed."

Subsequently codified in Revised Statues §1 (1st ed 1874), and Revised Statutes §1 (2d ed 1878).

In determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February twenty-fifth, eighteen hundred and seventy-one, words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular; words importing the masculine gender may be applied to females; the words "insane person" and "lunatic" shall include every idiot, noncompos, lunatic and insane person; the word "person" may extend and be applied to partnerships and corporations, and the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense; and a requirement of an "oath" shall be deemed complied with by making affirmation in judicial form.

Section 2 of the Civil Rights Bill of 1866; 14 Stat 27, ch 31, §2 (1866).

SEC. 2. And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person hav-

ing at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

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MICHIGAN DEPARTMENT OF STATE POLICE,
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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents, Michigan Department of State Police and Director of Michigan State Police, respectfully request that the Court deny the petition for writ of certiorari, seeking review of the decision of the Supreme Court of Michigan in this case reported at 428 Mich 540, 410 NW2d 749 (1987).

STATEMENT OF THE CASE

Because his brother's name was indexed to the "Red Squad" files of the Michigan State Police, petitioner Ray Will was not considered by the State Police for a lateral transfer in 1973 from Administrative Analyst 11 at the Michigan Department of Mental Health to Data Systems Analyst 11 at the Michigan Department of State Police. Two months and seven days later, Mr. Will obtained a Data Systems Analyst 11 position with the Michigan Department of Transportation.

The Michigan State Police were required by 1950 Michigan Public Acts, Extra Session, No. 38, 39 and 40 to collect, obtain, and compile information and evidence on, and to investigate activities pertaining to broad and ill defined areas relating to subversion and security. With the consent of the Michigan Attorney General, these laws were declared unconstitutional by a Michigan Circuit Court on February 3, 1976, and repealed by 1978 Michigan Public Act No. 571.

The "Red Squad" records of Mr. Will's brother were released to his brother in 1977.

When Mr. Will learned in 1977 of the reason he was not considered by the State Police, he filed a Civil Service grievance that was originally denied because it was too late.

Over Mr. Will's objection, the Michigan Attorney General successfully moved in March of 1978 for the return of the grievance matter to the Civil Service grievance system for a full hearing.

In November of 1978, Mr. Will sued in the Michigan Court of Claims, the court of exclusive original jurisdiction for claims against the State, alleging a cause of action under 42 USC §1983.

On June 10, 1980 the Civil Service Hearing Officer held, and the Civil Service Commission later upheld, that although "Mr. Will was not one of the exemplary candidates in the field" for transfer (Hearing Officer's Opinion, pg 7. HO 263-80), the State Police use of the fact that his brother was indexed to the "Red Squad" files was a substantial factor in Mr. Will not even being considered for a transfer, and this violated the 1963 Michigan constitution's prohibition in art 11, §5, para 6 on the use of "partisan considerations" in civil service transfers. Mr. Will was awarded back pay for the 2 months and 7 days until Mr. Will got a transfer at the same level to the Michigan Department of Transportation.

Mr. Will did not appeal the grievance decision nor did the State. On July 22, 1981 the parties accepted the June 10, 1980 grievance decision as the factual premise for the Court of Claims proceedings.

In a December 15, 1982 opinion in the Court of Claims case, the judge held that the state is a "person" under 42 USC §1983.

On December 30, 1982 the judge entered judgment on liability against the Michigan State Police defendants. On March 8, 1983 the judge entered judgment on damages against the Michigan State Police defendants for $153,262.64.

The Michigan Court of Appeals reversed in an appeal of right on July 9, 1985 on the §1983 issue, holding that the state was not a "person" under §1983 (Pet. App 132a), but remanded to the Court of Claims for a determination of the liability of the Director of the Michigan State Police in his official capacity (Pet. App 133a). The damage award was significantly reduced (Pet. App 134a-135a).

On August 7, 1987, the Michigan Supreme Court, by a 4-2 decision in an appeal by leave granted, affirmed the Court of Appeals decision that the state is not a "person" under 42 USC §1983 (Pet. App 9a), but reversed the Court of Appeals remand on the liability of the Director of the Michigan State Police in his official capacity (Pet. App 102a), holding that a suit for damages against a state official in his official capacity is in fact a suit against the state, and the official is not a "person" under 42 USC §1983 (Pet. App 9a). Justice Brickley authored, and Chief Justice Riley joined, a detailed rationale (Pet. App 18a-54a).

The Michigan Supreme Court denied rehearing on October 17, 1987 (Pet. App 2a).

The Petition for Certiorari was received by the State's counsel on January 8, 1988. The case was docketed on January 11, 1988. Respondents on February 3, 1988 responded by letter. On February 26, 1988 the Court requested a brief to be filed by March 28, 1988.

ARGUMENT

I.

PETITIONER'S CHARACTERIZATION OF THE MICHIGAN SUPREME COURT'S DECISION AND HIS ASSERTION OF A CONFLICT IN DECISIONS ARE INADEQUATE TO DEMONSTRATE ANY NEED FOR THIS COURT TO GRANT REVIEW.

A majority of the justices of the Michigan Supreme Court joined only in the short "Memorandum Opinion" that does not contain a detailed rationale, but merely holds, "The State is not a 'person' for purposes of a damage suit under §1983. Pet. App 9a-10a. The rationale that Petitioner challenges is found only in an opinion signed by two justices of the Michigan Supreme Court authored by justice Brickley, concurring with the Memorandum Opinion. Pet. App 10a & 102a. Two additional justices concurred only with the conclusion that "the State is not a 'person' for purposes of 42 USC 1983." Pet. App 102a & 117a.

Although, as explained in Argument II in this Brief in Opposition to the Petition, Respondents agree with both the conclusion that the State is not a "person" and with the rationale of justice Brickley's opinion, the fact that there is no majority opinion of the Michigan Supreme Court explaining its decision militates against granting certiorari.

Other factors that militate against the grant of certiorari are that (A) the petition overstates the degree of conflict between this Michigan Supreme Court decision and other state courts-of last resort or federal courts of appeal on the question of whether Congress intended to include the states as a "person" in section 1 of the 1871 Civil Rights Act, now 42 USC §1983; and that (B) the Petition seriously mischaracterizes the rationale of justice Brickley's opinion.

A. THE PETITION OVERSTATES THE DEGREE OF CONFLICT.

Conflicts between state courts of last resort, or between a state court of last resort and United States Courts of Appeal, may involve issues of federal law sufficiently important for this Court to grant certiorari. Supreme Court Rule 17.1(b) & (c). However, with respect to this Michigan case, Respondents submit that the degree of conflict with state courts of last resort and with the United States Courts of Appeal is overstated by Petitioner.

Respondent's Appendix lists those state courts of last resort and those United States Courts of Appeal of which Respondents are aware, that have handed down decisions subsequent to *Monell* v *Department of Social Services of the City of New York*, 436 US 658 (1978), saying a state is not a "person".

The United States Court of Appeals for the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have all held or affirmed District Court decisions that held that a state is not a "person". Respondent's App 2b. Only the United States Court of Appeals for the First Circuit has held that a state is a "person". *Della Grotta* v *State of Rhode Island*, 781 F2d 343, 349 (CA 1 1986).

The *Della Grotta* Court relied upon the analysis in *Marrapese* v *State of Rhode Island*, 500 F Supp 1207 (DRI 1980), a decision that was reversed by the First Circuit because the action

was not timely brought. 749 F2d 934 (CA 1 1984), *cert. denied*, 474 U.S. 921 (1985). The *Della Grotta* Court also relied on the concept that the state of Rhode Island, one of only a few states to have waived its sovereign immunity from suit in a federal court, was part of "bodies politic" (781 F2d at 348). That is, the *Della Grotta* Court implied without citation that the "Dictionary Act" of 1871 applied. That the "Dictionary Act" does not apply to the 1871 Civil Rights Act is demonstrated, *infra* in Argument II.B. of this brief.

Petitioner's citation of *Brogan v Wiggins School District*, 588 F2d 409 (CA 10 1978), as being in conflict is totally erroneous. In the December 1978 decision, 6 months after *Monell* v *Department of Social Services of the City of New York*, 436 US 658 (1978), the United States Court of Appeals said of the 1976 claims by the pro se plaintiff and appellant: "This claim [under §1983], however, has no merit because it seeks money damages (rather than injunctive relief, for example). Since the Colorado State Board of Education is not a suable entity in a money damage action, the trial court was correct in its ruling." 588 F2d at 411.

Nor is there any conflict, as petitioner argues, with the U.S. Court of Appeals for the Fifth Circuit. In *Ruiz* v *Estelle*, 679 F2d 1115, 1137 (CA 5 1982), *cert denied*, 460 US 1042 (1983), the Fifth Circuit clearly held that a state is not a "person". Petitioner claims a conflict with *Gay Student Services* v *Texas A & M University*, 612 F2d 160, 163-164 (CA 5 1980), *cert. denied* 449 US 1034 (1980). *Gay Student Services* did not hold that a state is a "person", it held that "there would appear to be no analytical difference in the operation of universities and other governing bodies such as cities." 612 F2d at 164.

State courts of last resort that have held a state is not a "person" are those of Alaska, Idaho, Maine, Michigan, New York, and Washington. Respondent's App 3b.

No state court of last resort has "held" that a state is a "person".

In a Maryland case, *De Bleecker* v *Montgomery County*, 292 Md 498, 438 A2d 1348 (1982), the plaintiff was suing a county in Maryland because of his discharge from public employment. In gratuitous obiter dictum without any rationale, the Maryland Court of Appeals said in a footnote: "Unlike municipalities, the State and its agencies are immune from suit under §1983, unless the immunity is waived. *Quern* v *Jordan*, 440 U.S. 332, 99 SCt 1139, 59 L.Ed.2d 358 (1979); . . .". 292 Md at 513 n. 4, 438 A2d at 1356 n. 4.

Gumbhir v *Kansas State Board of Pharmacy*, 231 Kan 507, 646 P2d 1078 (1982), *cert denied*, 459 US 1103 (1983), cited by Petitioner as being in conflict with *Will*, was a suit for attorney's fees under 42 USC §1988 in which the Kansas Supreme Court concluded that "the Kansas State Board of Pharmacy did not subject Gumbhir to a deprivation of rights, privileges or immunities secured to him by the Constitution and laws of the United States. Thus Gumbhir is not a prevailing party as required since there was no 42 U.S.C. §1983 violation upon which a civil rights attorney fee claims could be based." 231 Kan at 523, 646 P2d at 1090. Since there was no §1983 violation, the court's statement that "the sounder view in a case such as this, where prospective injunctive relief is sought, is that a state agency should be considered a 'person' under the statute.", 231 Kan at 513, 646 P2d at 1084, is gratuitous obiter dictum.

In *Beck* v *Kansas Adult Authority*, 241 Kan 13, 21, 735 P2d 222, 229 (1987), the Kansas Supreme Court stated that "[w]e have never held that state agencies were persons under 42 U.S.C. §1983 for the purpose of suits seeking damages thereunder. . . . (The state of Kansas has not waived its sovereign immunity from suits seeking monetary damages under 42 U.S.C. §1983.)"

In *Kimberly* v *City of Green River*, 663 P2d 871 (Wyo 1983), the Wyoming Supreme Court held that "[s]ince all of the appellee natural persons had a viable immunity from suit as a defense to all charges of tortious conduct, there is no liability incurred by the State of Wyoming . . .". 663 P2d at 888. Despite this lack of liability on the part of the State, the Wyoming Supreme Court said in gratuitous obiter dictum; "With respect to appellants' claim of deprivation of constitutional rights pursuant to the Federal Civil Rights Act, 42 U.S.C. §1981, et seq, it is now clear that the state and municipalities, including counties, are within its sweep and treated as natural 'persons,' though artificially so." 663 P2d at 883 No rationale for the conclusion was given.

Uberoi v *University of Colorado*, 713 P2d 894 (Colo 1986), *pet for cert filed*, 56 USLW 3592 (U.S. Feb 11, 1988) (No. 87-1351), cited by Petitioner as being in conflict with *Will*, speaks only in terms of universities. Of the four post-*Monell* cases cited, three pertain to educational institutions not considered to be state entities, but equivalent to local government entities. Only one cited case, *Weisbord* v *Michigan State University*, 495 FSupp 1347 (WDMich 1980), pertains to a state entity. It would seem that the Colorado Supreme Court in its reference to *Monell* v *Department of Social Services of the City of New York*, 436 US 658 (1978); to "local governing bodies" and "local governments"; and to cases involving universities that were held to be the equivalent of local governing bodies, came to hold that the University of Colorado was a "person" because the University was equivalent to a local governing body. This conclusion is reinforced by the language in the two dissents that refer to "a local governing body such as a university", and to "local governments." 713 P2d at 904. The plaintiff-appellant, professor Uberoi appeared pro se.

Thus, of the decisions by the state courts of last resort and United States Courts of Appeal cited by Petitioner, and those others known to Respondent, only one is in conflict with the

conclusion of the Michigan Supreme Court and with the rationale of justice Brickley's opinion. This is not the type of pervasive conflict which requires review by this court.

B. THE PETITION MISCHARACTERIZES THE RATIONALE OF THE OPINION OF TWO JUSTICES OF THE MICHIGAN SUPREME COURT, AUTHORED BY JUSTICE BRICKLEY.

The Petitioner's mischaracterizations regarding the existence of a conflict continue in Argument IV of his Petition where Petitioner incorrectly asserts that the rationale of justice Brickley's opinion conflicts with the views of this Court.

Petitioner seeks to create the impression that justice Brickley's opinion stands for the proposition that Michigan courts will not entertain any §1983 cause of action. This is untrue. Michigan courts entertain causes of action against local governing bodies, *e.g., Electro-Tech, Inc.* v *H.F. Campbell Co. and City of Westland*, 161 Mich App 622, 411 NW2d 800 (1987), *lv applied for* Oct 19, 1987, SCt No. 81866; and against individuals, *e.g. Boggerty* v *Wilson*, 160 Mich App 514, 408 NW2d 809 (1987), *lv denied* ____ Mich ____ (1988) (Feb 22, 1988, SCt No. 81506). In the instant case the Michigan Supreme Court concluded only that Congress did not intend to include states within the meaning of "person" in 42 USC §1983, and that a suit in Michigan's Court of Claims against a state official in his official capacity is a suit against the state, hence that suit is barred because the state is not a "person".

Petitioner at pages 26-27 of his Petition attempts to obfuscate justice Brickley's rationale by injecting the irrelevant concept of Congressional abrogation of Eleventh Amendment immunity, and by ignoring the underlying "fundamental principle of sovereign immunity", "of which the [Eleventh] Amendment is but an exemplification." *See, e.g. Pennhurst State School & Hospital* v *Halderman*, 465 US 89, 98-99 (1984).

C. THERE IS NO NEED FOR THE COURT TO GRANT REVIEW.

A careful analysis demonstrates that there is no irreconcilable conflict as to either result or rationale among the decisions of the state courts of last resort or the United States Courts of Appeal on the question of whether Congress intended to include states as "persons" in the 1871 Civil Rights Act.

If the conclusion of the Supreme Court of Michigan and the rationale of justice Brickley's opinion will "have a great influence on other state courts" (Pet. brief p 27), it will be because justice Brickley's rationale is so thorough and because the conclusion is correct.

Those state courts of last resort and those United States Courts of Appeal that have given careful thought to the question, and that have had factual situations before them that called for a holding rather than dictum, have concluded that Congress did not intend to include states as "persons" in the 1871 Civil Rights Act. The presence of decisions such as this case with the in depth rationale of the two justices, will in time have a persuasive effect on subsequent cases from around the country.

Respondents submit that the conflict Petitioner asserts is more apparent than real, and any conflict which exists is tolerable.

There is no need to grant Petitioner's petition.

II.

THE MICHIGAN SUPREME COURT CORRECTLY CONCLUDED THAT CONGRESS DID NOT INTEND TO INCLUDE THE STATES WITHIN THE MEANING OF "PERSON" IN §1 OF THE CIVIL RIGHTS ACT OF 1871 (42 USC §1983).

A. THE "EVENTS AND PASSIONS OF THE TIME IN WHICH THE LAW WAS FORGED" DO NOT GIVE ANY INDICATION THAT CONGRESS INTENDED TO SUBJECT THE STATES TO SUIT ON A FEDERAL CAUSE OF ACTION IN THEIR OWN COURTS FOR A CIVIL RIGHTS DEPRIVATION.

1. "EVENTS AND PASSIONS" LEADING TO THE CIVIL RIGHTS ACT OF 1871.

The Court said in 1982:

" ' . . . be mindful of the 'events and passions of the time in which the law was forged.' "

> *General Building Contractors Association, Inc v Pennsylvania*, 458 US 375, 386 (1982).

Led by a group of Republicans called "Radicals", Congress took the initiative after the Civil War ended. K.M. STAMPP, THE ERA OF RECONSTRUCTION 1865-1877, 83-118 (1965).

Congress stated that Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia did not have legal state governments, hence they were subject to military commanders and to "the paramount authority of Congress." 15 Stat 14, ch 30 (Tennessee had been "restored" on July 24, 1866 (Joint Resolution 73, 14 Stat 364)).

The former rebel states were gradually "restored"; that is, they met Radical Republican standards under a Republican President (General Grant). By the end of 1870, all former rebel states had been "restored", and all but one had reconstruction governments. The exception was North Carolina that had lost its reconstruction government in 1870. *E.g.*: R.S. HENRY, THE STORY OF RECONSTRUCTION 414 (1938). This remained the situation through 1871. J.W. BURGESS, RECONSTRUCTION AND THE CONSTITUTION 1866-1876, 249 (1902).

The focus of Congressional concern had shifted from hostile state statutes against Blacks to the activities of groups like the Ku Klux Klan, operating wholly outside the law. *Jones v Alfred H. Mayer Co*, 392 US 409, 436 (1968).

Several of the former rebel states had passed anti-Ku Klux Klan laws. These acts were ineffective and enforcement was impossible. 2 E. P. OBERHOLTZER, A HISTORY OF THE UNITED STATES SINCE THE CIVIL WAR 371 (1922).

Congress reacted with the "Force Acts". On May 31, 1870, the First Force Act, 16 Stat 140, ch 114, sought to guarantee the voting privilege to Blacks in the Southern States with penalties for obstructing that right. Control was put in the U.S. Courts, with the president authorized to employ the land and naval forces. Section 18 of the 1870 First Force Act reenacted the Civil Rights Bill of April 9, 1866 (14 Stat 27, ch 31). *See, also* §17.

Nothing changed. Masses of reports came to President Grant from military officers in the South. Southern Governors and other civil officials appealed to the President. Petitions and sworn accounts were received.

A second "Force Act" was enacted on February 28, 1871 (16 Stat 433, ch 99), that amended and strengthened the First Force Act of May 31, 1870.

Despite all of this, conditions in the South continued to deteriorate (2 E.P. OBERHOLTZER, HISTORY OF THE UNITED STATES SINCE THE CIVIL WAR 368-380 (1922)); in part because radical Republican dedication was gradually being moderated, K.S. STAMPP, THE ERA OF RECONSTRUCTION 186-215 (1965).

President Grant was skeptical of using the army to enforce racial justice, and he did not want to be charged with being a military dictator. He had sanctioned an earlier bill that had been defeated, and the Congressional managers of the legislation concluded that they could not put through any legislation without a strong call for it by the President. W.S. McFEELEY; GRANT: A BIOGRAPHY 369 (1981); A.W. TRELEASE, WHITE TERROR 387-388 (1971).

While President Grant was on his way by carriage to Capitol Hill on March 23, 1871 to tell leading Congressman that he could not endorse legislation that might result in the use of troops for its enforcement, George Boutwell, the Secretary of Treasury, tried to dissuade him. This effort, coupled with the citations of atrocities Grant heard at the Capitol, caused Grant to agree to give a public endorsement. This came later on the same day, March 23, 1871, in a message in which Grant asked for special help for the Restoration governments (7 A Compilation of the Messages and Papers of the Presidents, 1789-1897, p 127 (H. Misc Doc 210, part 7, 53d Cong, 2d Sess)). W.S. McFEELEY, GRANT: A BIOGRAPHY 369 (1981); 2 G.S. BOUTWELL: REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 252 (1902). *See, Monroe v Pape*, 365 US 167, 172-173 (1961).

President Grant's March 23, 1871 message said:

> "A condition of affairs now exists in some of the States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue

> dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of the State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear.
>
> Therefore I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property and the enforcement of law in all parts of the United States . . .".

These, thus, were the "events and passions of the time in which the law was forged."

The questions raised by the "events and the passions" of early 1871 is whether a predominately Republican Congress, in response to a Congressionally invited call from a Republican president for additional federal executive authority to "secure life, liberty, and property and the enforcement of law in all parts of the United States", but particularly in "some of the States of the Union" (the former rebel states with their restored Republican governments), would react to such a call with a law that imposed civil liability on the very states most needing assistance, states for which the power to protect the security of life and property was beyond their control.

Two Justices of the Michigan Supreme Court made an "historical analysis of the reasons why Congress enacted the Ku Klux Klan Act of 1871", and properly concluded that the 1871 Congress did not intend to include the States as "persons" (Pet. App 42a-45a).

2. SOVEREIGN IMMUNITY FROM SUIT WAS THE RULE OF LAW IN 1871.

When in 1871 the debate started on what was to become

today's 42 USC §1983, the rule of law was that a sovereign, the United States and the states, could not be sued without its consent in its own courts by its own citizens; nor could a state be sued in a federal court without its consent by one of its own citizens, a citizen of another state, or citizens or subjects of a foreign state. *E.g.*: 1 COOLEY'S BLACKSTONE 155, n.2 (1st ed 1871) ("A government is not liable to be sued in its own courts except by its own consent; . . . "; *Coster v City of Albany*, 43 NY 399, 407 (1871); *Pennsylvania Railroad Co v Dusquene Borough*, 46 Pa (10 Wright) 223, 228 (1864); *Rose v Governor*, 24 Tex 496, 504 (1859).

In *Kentucky v Graham*, 473 US 159, 169 n.17 (1985), the Justices agreed unanimously that

> "The Court has held that §1983 was not intended to abrogate a State's Eleventh Amendment immunity. *Quern* v. *Jordan*, 440 U.S. 332 [345] (1979) . . .".

The question thus narrows to whether the members of the 42nd Congress, 1st Session, intended in 1871, under the "events and passions of the time", to change the prevailing rule of law on sovereign immunity. Did the members of Congress intend that a state could be sued by one of its own citizens on a federal civil rights cause of action in its own state courts without its consent when the power to protect the security of life and property was beyond the state's control, and the federal executive was seeking additional statutory authority to assist the state in securing "life, liberty, and property, and the enforcement of law"? Did the members of Congress intend that a state could be sued by one of its own citizens in the federal courts on a federal civil rights cause of action by waving its sovereign (Eleventh Amendment) immunity?

Two Justices of the Michigan Supreme Court property concluded that it was

" 'unlikely, however, that Congress would have intended to enact a statute creating a remedy for violation of civil rights, while at the same time precluding private individuals from bringing actions under the statute against states in federal court but permitting such actions against states in state courts.

* * *

[I]t is our opinion based on *Quern v. Jordan*, 440 US 332 (1979) and decisions of other states that the term "persons" in §1983 was not intended to include states and state agencies.' " (Pet. App 44a-45a).

B. THE "DICTIONARY ACT", 16 STAT 431, CH 71, DID NOT DETERMINE THAT "PERSON" IN THE CIVIL RIGHTS ACT OF 1871 INCLUDED STATES.

The Congressional debate on HR 1351, 41st Cong. Sess 3, that became the "Dictionary Act", illustrates that the purpose of the "Dictionary Act" was to provide guidance to a codification commission that had been authorized on June 27, 1866, 14 Stat 74, ch 140.

> "We cannot pass a law that will bind other Congresses; but if we pass a law prescribing the language of our statutes . . . we can conform to it in our legislation." Cong Globe, 41st Cong, Sess 3, 776 (Jan 27, 1871) (Sen Trumbull).
>
> "[T]he purpose of the bill [HR 1351] is to control the action of the commission on codification now proceeding." Cong Globe, 41st Cong, Sess 3, 776 (Jan 27, 1871) (Sen Conkling).
>
> "The importance of the whole bill arises mainly from the fact that all our national statutes are now in process of revision, and in such a state of forwardness as to warrant the expectation that we may soon have a well-arranged and compacted body of operative statutes.

> . . .
>
> The other sections established a few general rules for the construction of statutes . . . all designed to avoid prolixity and tautology in drawing statutes and to prevent doubt and embarrassment in their construction." Cong Globe, 41st Cong, Sess 3, 1474 (Feb 21, 1871) (Rep Poland).

The "Dictionary Act" in §2 said:

> "That in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . .".

"[L]ocal government units which are not considered part of the State for Eleventh Amendment purposes" such as municipalities are "persons" because in 1871 municipal corporations were analogized to private corporations and "were treated as as natural persons for virtually all purposes of constitutional and statutory analysis." *E.g.: Owen v City of Independence, Missouri*, 445 US 622, 638-639 (1980).

It is almost impossible to believe that the members of the 42nd Congress would have intended to do away with the long-standing tradition of the immunity of a state from suit by a citizen in its own courts, and in the federal courts, through a mechanism enacted by the 41st Congress that was meant to "control the action of the commission on codification now proceeding." Cong Globe, 41st Cong, Sess 3, 776 (Jan 27, 1871).

This is particularly hard to believe when it is discovered that the Commission on Codification did not use the definition of "person" from the 41st Cong, 3rd Session, February 25, 1871 "Dictionary Act". *See, Monroe v Pape*, 365 US 167, 190 n.47 (1961).

When the codification was finally enacted as the Revised Statutes, this is what became of the pertinent part of §2 of the "Dictionary Act".

"In determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February Twenty-Fifth, Eighteen Hundred and Seventy-one, . . . the word 'person' may extend and be applied to partnerships and corporations . . .". Revised Statutes §1 (1874) & (1878).

The Civil Rights Act of 1871 was passed on April 20, 1871.

The Commissioners who drafted the Revised Statutes explained the change as follows:

"Substantially the same as section 2 of the Act of February 25, 1871, ch. 16, *Stat. at L.*, substituting at the commencement the words 'In * * * 1871,' for 'That in all acts hereafter passed;' also, substituting the words 'partnerships and corporations' for 'bodies politic and corporate.' The reasons for the latter change are that partnerships ought to be included; and that if the phrase 'bodies politic' is precisely equivalent to 'corporations,' it is redundant; but if, on the contrary, 'body politic' is somewhat broader, and should be understood to include a government, such as a State, while 'corporation' should be confined to an association of natural persons on whom government has conferred continuous succession, then the provision goes further than is convenient. It requires the draughtsman, in the majority of cases of employing the word 'person,' to take care that States, Territories, foreign governments, &c., appear to be excluded."

1 Revision of the United States Statutes as drafted by the Commissioners Appointed for That Purpose. In Two Volumes. As Bound for Examination by the Committee of the House of Representatives of the Forty-Second Congress on the Revision of the Laws, p. 19 (1872).

Since "body politic and corporate" may refer to either a government (*United States v Maurice*, 26 FCas 1211, 1216 (CC DVa 1823) (No. 15747) (Marshall, C.J.)), or to an artificial body of individuals (*Warner v Beers*, 23 Wend 103, 122 (NY Ct Corr Errors 1840)), the Commissioners did not know which meaning to derive from the "Dictionary Act". Congress resolved this in Revised Statutes §1 (1874) & (1878) by saying, in effect, that "person" was meant to apply only to partnerships and corporations, and that in any act enacted after the date of the "Dictionary Act" this was the meaning. This could include a governmental body, such as municipality treated as a corporation; *see; Northwestern Fertilizing Co v Hyde Park*, 18 FCas 393 (CC ND Ill) (1873) (No. 10,336); but not a state, which is not so treated.

Since the Civil Rights Act of 1871 was enacted 2 months after the "Dictionary Act", "person" in the Civil Rights Act of 1871 did not refer to a state.

This is reflected in the Congressional debates on the 1871 Civil Rights Act in which there does not appear to be any comment that the 1871 Civil Rights Act applies to states because of the definition in the "Dictionary Act".

Two Justices of the Michigan Supreme Court properly concluded that the "Dictionary Act" is not to be interpreted as meaning that the 1871 Congress intended a state to be a "person" (Pet. App 46a). As the two Justices said (Pet. App 46a):

"[T]he Dictionary Act, enacted two months prior to the Ku Klux Klan Act . . . was enacted five years *after* the model for §1 of the Ku Klux Klan Act, §2 of the Civil Rights Act of 1866 [14 Stat 27]." (emphasis in opinion).

C. THE LEGISLATIVE HISTORY OF THE 1871 ACT DOES NOT WARRANT THE CONCLUSION THAT CONGRESS INTENDED TO REQUIRE THOSE SEEKING REDRESS FOR A DEPRIVATION OF RIGHTS PROTECTED BY THE UNITED STATES CONSTITUTION TO SEEK REDRESS IN THE VERY STATE COURTS WHOSE DENIAL OF REDRESS BROUGHT ON THE 1871 ACT.

Although the state courts retained concurrent jurisdiction, *Patsy v Board of Regents of the State of Florida*, 457 US 496, 506-507 (1982), ". . . state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.", *Mitchum v Foster*, 407 US 225, 240 (1972). "Congress enacted §1983 and its predecessor, §2 of the Civil Rights Act of 1866, 14 Stat 27, to provide an independent avenue for protection of federal constitutional rights.", *Pulliam v Allen*, 466 US 522, 540 (1984). "[I]f state judiciaries could have been counted on to enforce the provisions of the federal constitution, the entire legislative scheme would have been unnecessary.", Nichol: *Federalism, State Courts, and Section 1983*, 73 Va L Rev 959, 974 (1987).

In *Kentucky v Graham*, 473 US 159, 169 n.17 (1985), the Court agreed that it had held §1983 was not intended to abrogate a State's Eleventh Amendment immunity. To argue that a state is a "person" under 42 USC §1983 is to argue that Congress in 1871 intended to create federal causes of action against states for deprivation of federal Constitutional rights to be brought in the state courts only, even though the purpose of the 1871 Act was to put these kind of cases in the federal courts because the state courts were not doing their job.

Two Justices of the Supreme Court of Michigan properly concluded that this was not the intent of Congress. Pet. App 42a, 43a, and 44a.

The legislative history has been thoroughly examined in *Monroe v Pape*, 365 US 167 (1961); *Monell v Department of Social Services of the City of New York*, 436 US 658 (1978); and *Quern v Jordan*, 440 US 332 (1979).

Respondents submit that there is no indication from the legislative history that the states were to be included within the meaning of the word "person".

As two Justices of the Michigan Supreme Court said in their concluding paragraph on the question:

> "The circumstances surrounding passage of §1983 further support this conclusion." (Pet. App 47a).

The two Justices are correct.

CONCLUSION

For reasons stated in this brief, Respondents respectfully request that the Court deny the petition for certiorari to the Supreme Court of the State of Michigan.

Respectfully submitted,

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APPENDIX

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Decisions by United States Courts of Appeal and by State Courts of last resort that a state is not a "person" under 42 USC §1983.

United States Courts of Appeal 2b

State Courts of Last Resort 3b

DECISIONS BY UNITED STATES COURTS OF APPEAL AND BY STATE COURTS OF LAST RESORT THAT A STATE IS NOT A "PERSON" UNDER 42 USC §1983.

UNITED STATES COURTS OF APPEAL.

FOURTH CIRCUIT.

Bennett v Reed,
676 F2d 690 (CA 4 1982), *aff'g mem*, 534 FSupp 83, 85 (EDNC 1981).

FIFTH CIRCUIT.

Ruiz v Estelle, 679 F2d 1115, 1137 (CA5 1982), *cert denied*, 460 US 1042 (1983).

SIXTH CIRCUIT.

Gross v University of Tennessee, 620 F2d 109, 110 (CA6 1980) (per curiam),
aff'g, 448 FSupp 245, 247-248 (WDTenn 1978).

SEVENTH CIRCUIT.

Toledo, Peoria & Western Railroad Co v State of Illinois, Department of Transportation,
744 F2d 1296, 1297 (CA7 1984), *cert denied*, 470 US 1051 (1985).

See, also:
Harris v Missouri Court of Appeals, Western District,
787 F2d 427, 429 (CA 8 1986),
cert denied, 107 SCt 179 (1986).

STATE COURTS OF LAST RESORT.

ALASKA.

State v Green,
633 P2d 1381, 1382 (Alaska 1981).

Accord: Wickwire v State,
725 Pd 695, 704 n.9 (Alaska 1986).

IDAHO.

Merritt for Merritt v State,
108 Id 20, 26, 696 P2d 871, 877 (1985).

MAINE.

Thiboutot v State of Maine,
405 A2d 230, 236 (Maine 1979),
aff'd on other grounds, 448 US 1 (1980).

MICHIGAN.

Will v Department of Civil Service,
428 Mich 540, 544, 410 NW2d 749, 750 (1987), *pet for cert filed, sub nom, Will v Michigan Department of State Police*, 56 U.S.L.W 3530 (U.S., Jan 11, 1987), (SCt No. 87-1207).

NEW YORK.

Thomas v New York Temporary State Commission on Regulation of Lobbying . . .,
56 NW2d 656, 451 NYS2d 708, 436 NE2d 1310 (1982),
aff'g 83 AD2d 723, 442 NYS2d 632, 634 (3rd Dept 1981).

WASHINGTON.

Edgar v State,
92 Wash2d 217, 221, 595 P2d 534, 537 (1979), *cert denied*, 444 US 1077 (1980),

Accord: Hontz v State,
105 Wash2d 302, 309, 714 P2d 1176, 1180 (1986).